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No. 83-900

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN D. JONES, a/k/a JACK JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion when it disqualified petitioner's trial counsel because of counsel's prior representation, on related criminal charges, of an important witness for the prosecution.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unreported. The opinion of the district court (Pet. App. A4-A11) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1983. The petition for a writ of certiorari was filed on November 29, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In November 1982[1] a grand jury sitting in the Eastern District of Pennsylvania indicted petitioner on multiple counts charging him with receiving and selling motor

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[1]The September and November 1983 dates appearing on pages 3 and 4 of the petition are apparently printing errors. See Pet. App. A5-A7.

vehicles stolen from interstate commerce, in violation of 18 U.S.C. 2315 and 2313 (Counts 1-5), and mail fraud, in violation of 18 U.S.C. 1341 (Counts 6-8). Petitioner retained Wallace C. Worth, Jr., to represent him. Because Worth had previously represented a key government witness, Henry Krotzer, following his arrest on related state charges, the government moved to disqualify Worth from representing petitioner. Following an evidentiary hearing on the government's motion, the United States District Court for the Eastern District of Pennsylvania disqualified petitioner's counsel (Pet. App. A11). The court of appeals accepted petitioner's interlocutory appeal and affirmed by judgment order (Pet. App. A1-A2).

1. Evidence presented at the disqualification hearing revealed that petitioner buys and sells used tractor trailor and truck parts. In June 1982, state officials obtained a search warrant for and impounded a truck belonging to Henry Krotzer, one of petitioner's employees. Petitioner thereafter arranged for attorney Worth to help Krotzer repossess the truck (Pet. App. A5). Petitioner also told Krotzer that, should he be arrested as a result of the search, he should contact Worth immediately (*id.* at A20).

In September 1982, Krotzer was arrested on state charges, which included receiving stolen property, unauthorized use of a motor vehicle, conspiracy, and falsification of an identification number (Pet. App. A5). The state charges named petitioner as a co-conspirator (*ibid.*). Upon his arrest, Krotzer asked his wife to telephone petitioner, and petitioner, in turn, contacted Worth (*ibid.*). Worth then called Krotzer at the police station and told him to make no statements to the police (*ibid.*).

The following day, Krotzer was released and went to petitioner's garage to discuss the charges with him. Petitioner instructed Krotzer not to reveal anything he knew

about the activities charged in the state complaint, including petitioner's participation therein (Pet. App. A5-A6). He then took Krotzer to Worth's office, where the attorney questioned the two men regarding the state charges. At one point during this interview, when Krotzer indicated that he knew something about one of the vehicles mentioned in the state charges, petitioner gave Krotzer a "dirty look" (*id.* at A6, A22). Petitioner then answered the remainder of Worth's questions (*id.* at A6). Krotzer testified that he agreed with petitioner's responses to Worth, even though they were not accurate, because of the "dirty look" petitioner had given him when he had volunteered the truth (*id.* at A16-A25).

Following this interview, Worth represented Krotzer at the first preliminary hearing on the state charges.[2] Soon thereafter, Krotzer went to the Lehigh County Public Defender's office to seek another attorney because he distrusted Worth and petitioner (Pet. App. A25). At a second preliminary hearing held on November 19, 1982, Krotzer informed Worth that he no longer desired Worth's services (*id.* at A24-A25).

2. After detailing the above facts, the district court found that, given the nature of Worth's prior representation of Krotzer, the attorney should be disqualified from continued representation of petitioner in the instant prosecution (Pet. App. A11). The court noted that the government intends to call Krotzer as a prosecution witness (*id.* at A10). It then properly reasoned that, during cross-examination of

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[2]The district court found that, throughout this hearing, "Worth acted as if he were representing the interests of both [petitioner] and Krotzer. He vigorously cross-examined the witnesses about [petitioner]. Although [petitioner] was not a defendant at the hearing, Worth objected when some testimony was elicited regarding [petitioner]" (Pet. App. A6). Petitioner, moreover, paid Worth's fee for representing Krotzer (*id.* at A28).

Krotzer, "Worth would be faced with a former client testifying to facts inconsistent with those disclosed to him in a confidential communication. Worth would be tempted to use the prior inconsistent statements made by Krotzer when he assented to [petitioner's] statements at the meeting to impeach Krotzer, in an effort to zealously defend petitioner" (*ibid.*). Alternatively, the court noted that it was "also possible that Worth, aware of his obligation to his former client, would overcompensate and be less then zealous in his cross-examination of Krotzer thereby denying [petitioner] his sixth amendment right to effective assistance of counsel" (*ibid.*). In either circumstance, the court held that "an actual conflict of interest is very likely to arise before the end of the [petitioner's] trial" (*id.* at A11). It accordingly granted the government's motion.

ARGUMENT

Petitioner argues (Pet. 7-15) that the trial court's order unjustifiably interferes with his right to counsel of choice. This essentially fact-bound contention does not merit review by this Court.

1. At the outset, we note that this case raises the threshold issue of the court of appeals' jurisdiction under 28 U.S.C. 1291 to hear petitioner's interlocutory appeal. While this question was not raised below, jurisdictional matters may be addressed for the first time in this Court. See, *e.g.*, *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206, 209 (1963); *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U.S. 449, 451-452 (1935). For the reasons stated (at 14-36) of our brief in *Flanagan* v. *United States*, No. 82-374 (argued Nov. 30, 1983), we submit that a pretrial order disqualifying defense counsel is not a "final decision" of a district court under 28 U.S.C. 1291 and hence is appealable only after conviction and imposition of

sentence.[3] Indeed, this case demonstrates the principal evil of ignoring the final judgment rule in the context of a criminal prosecution: unnecessary and debilitating delay.[4]

2. In any event, however this Court may dispose of the jurisdictional issue in *Flanagan*, this case does not merit review because the decision of the lower courts is correct on the merits. The main thrust of petitioner's choice-of-counsel arguments (Pet. 8-15) appears to be that the district court erred in finding that a conflict of interest is inherent in Worth's representation of petitioner. The record in this case, however, amply supports the district court's finding that an actual conflict of interest is likely to arise should Worth continue representing petitioner.[5]

a. Petitioner is charged with conspiring with Krotzer and others to receive and sell stolen tractors. Krotzer's testimony regarding his dealings with petitioner, therefore, will be a central part of the government's case. Worth, moreover,

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[3]We are serving petitioner with a copy of our brief in *Flanagan*.

[4]Petitioner's trial has been delayed more than nine months during the pendency of his appeals and petition to this Court. Had the court of appeals disposed of his case by means of a signed opinion rather than a judgment order (Pet. App. A1), the delay could well have been even greater. Cf. 18 U.S.C. 3161(c)(1) (Speedy Trial Act provision requiring trial to begin within 70 days of indictment).

[5]Petitioner argues (Pet. 8-10) on the basis of *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), that disqualification cannot be ordered in advance of trial unless there is a demonstrated "actual" conflict. But, although *post-trial* reversal may be justified only where a defendant demonstrates that "an actual conflict of interest adversely affected his lawyer's performance" (446 U.S. at 350), such a standard plainly is not appropriate for prophylactic, pre-trial inquiries into potential conflicts of interests. Fed. R. Crim. P. 44(c) expressly provides for pre-trial inquiries into possible conflicts of interest, and the advisory committee note to that Rule states that "it is important that the trial judge ascertain whether the effective and fair administration of justice would be adversely affected by continued * * * representation, even when an actual conflict is not then apparent." 77 F.R.D. 594, 596 (1978).

previously represented Krotzer on related state charges.[6] During the course of that representation, Krotzer met with Worth, discussed the state charges against him, admitted that he had information regarding one stolen automobile, and thereafter concurred in petitioner's allegedly erroneous explanations of the facts underlying the state and federal charges (Pet. App. A5-A6).

The district court properly ruled that these communications between Krotzer and Worth were confidential communications protected by the attorney-client privilege,[7] and that Worth would be hard pressed at trial not to cross-examine Krotzer regarding possible inconsistencies between his trial testimony and prior position during the interview. To paraphrase the petitioner, there is "no question" but that Worth has "obtained confidential communications from both clients" and that his continued representation of petitioner will force him "into a position of cross-examining one of his own clients in order to protect the interest of his other client" (Pet. 12). In such circumstances, disqualification is entirely appropriate. *United States* v. *Provenzano*, 620 F.2d 985, 1004-1005 (3d Cir.), cert. denied, 449 U.S. 899 (1980); *United States* v. *Dolan*, 570 F.2d 1177, 1184 (3d

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[6]The transactions charged in counts 3 and 4 of the federal indictment form the basis for one of the state charges against Krotzer (Pet. App. A20).

[7]Communications between a client and his counsel are generally non-privileged when a third party is present during the interview. The presence of more than one client at a conference with an attorney, however, does not destroy the privilege. Such communications are protected, despite the presence of the second client, if the communication refers to a matter of common interest. See *Hunydee* v. *United States*, 355 F.2d 183 (9th Cir. 1965); 2, *Weinstein's Evidence* 503-506 (1982). Here, of course, Krotzer's communications with Worth referred to a matter of vital interest to both Krotzer and petitioner, and the district court found that Worth thereafter "acted as if he were representing the interests of both Jones and Krotzer" (Pet. App. A6).

Cir. 1978); *United States* v. *Kitchin*, 592 F.2d 900, 904 (5th Cir.), cert. denied, 444 U.S. 843 (1979). See also *Ross* v. *Heyne*, 638 F.2d 979, 982-984 (7th Cir. 1979).[8]

b. Even were the district court incorrect in its conclusion that the attorney-client privilege covered Krotzer's prior communications with Worth, disqualification would nevertheless be appropriate. Worth owes an ethical obligation of loyalty to Krotzer, and may not use information acquired during the course of his prior representation of Krotzer either to Krotzer's disadvantage or to the advantage of petitioner. Model Code of Professional Responsibility DR4-101 (1980) (an attorney shall not use information gained in a professional relationship "for the advantage of himself or of a third person, unless the client consents after full disclosure"); Rule 1.6, ABA Model Rules of Professional Conduct Rule 1.6 (1983) ("[a] lawyer shall not reveal information relating to representation of a client unless the

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[8]Petitioner argues (Pet. 13) that the district court erred in finding that Krotzer's interview with Worth involved confidential communications, because petitioner and Krotzer testified that Krotzer did not reveal anything "confidential" to Worth. Aside from the fact that this assertion ignores Krotzer's testimony that he did reveal his knowledge regarding at least one stolen vehicle to Worth and thereafter agreed with petitioner's rendition of the facts underlying the state charges (Pet. App. A22), the district court is not bound to agree with petitioner's characterization of the legal nature of the communications between Krotzer and Worth.

Petitioner's related assertion (Pet. 15) that "Krotzer testified that there were no disclosures made by Krotzer which could be utilized by Worth to help Worth cross-examine Krotzer if Krotzer is actually called as a witness at [petitioner's trial]" is equally unavailing. Krotzer, a layman, was unlikely to realize that he could be effectively cross-examined on the basis of his prior inconsistent position regarding the facts underlying petitioner's alleged crimes. Moreover, Krotzer never made the statement attributed to him by petitioner. The testimony to which petitioner apparently refers (Pet. 15) consists of Krotzer's simple acquiescence to counsel's leading questions (see Pet. App. A31-A32).

client consents after consultation"). Worth could undoubtedly use information obtained during the course of his prior representation of Krotzer to petitioner's advantage,[9] but petitioner has never suggested that Krotzer has consented or would consent to such conduct by Worth.[10] Disqualification of Worth, therefore, was an appropriate exercise of the district court's supervisory authority over members of the bar to enforce the ethical standards governing the practice of law. See Fed. R. Crim. P. 44(c) advisory committee note, 77 F.R.D. 507, 603 (1978).

3. Petitioner mistakenly asserts (Pet. 7) that his case will be affected by this Court's decision in *Flanagan* v. *United States, supra*. Although that decision would, of course, dispose of this petition should the Court agree with the

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[9] For example, a possible course of Worth's cross-examination of Krotzer might be:

Worth:	Isn't is true that you indicated exactly the opposite to me in September 1982?
Krotzer:	Mr. Jones told you otherwise but . . .
Worth:	And you agreed with him, did you not?
Krotzer:	Yes, but . . .
Worth:	Just answer the question yes or no, Mr. Krotzer.

[10] Even were Krotzer to consent to be cross-examined by Worth, disqualification might be appropriate because of the substantial likelihood that the attorney would be called by one side or the other as a witness. As the above footnote demonstrates, Worth's primary importance to petitioner's defense could well be that he witnessed Krotzer convey information inconsistent with his expected trial testimony. If that eventuality arises, Worth should be called as a defense witness. See *United States* v. *Nobles*, 422 U.S. 225, 250 (1975) (White, J., concurring) ("[a] member of a defense team who witnesses an out-of-court statement of someone who later testifies at trial in a contradictory fashion becomes at that moment a witness to a relevant and admissible event"). The role of a witness is inconsistent with that of an attorney. See Model Code of Professional Conduct DR5-101, 5-102 (1980).

government's jurisdictional arguments, any decision on the merits in *Flanagan* would be unlikely to validate petitioner's position in this case.

Flanagan presents the question whether the district court properly disqualified defense counsel from jointly representing multiple defendants despite their purported waiver of their right to independent counsel. This case does not present similar considerations. There is no waiver issue in this case,[11] and the conflict found by the district court does not result from joint representation but rather from Worth's successive representation of Krotzer and petitioner. Moreover, a successive representation case, far from presenting a situation where "the potential conflict is even less apparent" than in a joint representation case (Pet. 10), generally involves a factual background where any potential conflict is readily spotted and analyzed. In this case, for example, the general outlines of Worth's prior representation of Krotzer are known and the conflicting professional

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[11] Petitioner errs in complaining (Pet. 11 n.2, 15) that the district judge refused to permit his counsel "to explore" the question of whether he was prepared to waive his right to conflict-free representation. The district court prevented petitioner from answering Worth's question whether petitioner knew "of any conflict of interest that would exist to your detriment if the Court were to see fit to not disqualify me as your defense counsel" (Pet. App. A36). The inquiry was not allowed because the question sought a legal conclusion without any factual foundation. As the district court explained to counsel at the time, "If you want to reach that point, you'll have to lay a foundation. I don't know what education this witness has. I don't know if he is able to answer this question" (*ibid.*). Therefore, any blame for the state of the record on the waiver issue lies with counsel — not the district court. Petitioner has not been disabled from arguing waiver by the district court, but rather by counsel's failure to develop a factual background upon which to base a waiver argument. Petitioner, in any event, has not indicated any desire to waive his rights in this regard, and petitioner's waiver, standing alone, would not alleviate the conflict in this case. See text at page 10, *infra*.

responsibilities that are accordingly imposed on Worth are quite apparent. See, *e.g.*, Model Rules of Professional Conduct Rule 1.7 (1983) (lawyer shall not undertake successive representation adverse to the interests of a prior client unless "each client consents after consultation").

The attorney-client conflict in this case, finally, cannot be resolved by petitioner alone: in *Flanagan*, assuming contrary to our arguments there that the defendants' waiver of their right to conflict-free counsel must be accepted regardless of the costs that the waiver imposes on the criminal justice system, a valid waiver disposes of the asserted conflict. In a successive representation case, however, the defendant's willingness to waive his right to independent counsel cannot destroy the correlative rights of the other client. Petitioner, in short, cannot waive Krotzer's right not to be cross-examined regarding matters arising out of a confidential attorney-client relationship. This Court's disposition of *Flanagan*, therefore, promises little aid to petitioner's claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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